No. 94-923
No. 94-924

In The

Supreme Court of the United States

October Term, 1995

RUTH O. SHAW, et al.,

Appellants,

v.

JAMES B. HUNT, JR., et al.,

Appellees,

JAMES ARTHUR POPE, et al.,

Appellants,

v.

JAMES B. HUNT, JR., et al.,

Appellees.

On Appeal From The United States District Court
For The Eastern District Of North Carolina

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has provided legal representation to minorities in numerous jurisdictions throughout the country, and has frequently participated in voting rights cases before this Court, both as direct counsel, *see, e.g., Miller v. Johnson*, 115 S.Ct. 2475 (1995); *Holder v. Hall*, 114 S.Ct. 2581 (1994); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982), and as *amicus curiae, see, e.g., United States v. Hays*, 115 S.Ct. 2431 (1995); and *Davis v. Bandemer*, 478 U.S. 109 (1986).

The Lawyers' Committee is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee. The Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 30 years, including cases before this Court, *see, e.g., Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

v. Smith, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *Rogers v. Lodge, supra*; and *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

SUMMARY OF ARGUMENT

The adoption of appellants' "race neutral" standard in redistricting – in reality a standard requiring or favoring majority white districts – would amount to repeal of the Voting Rights Act and would inevitably result in the broad purge of minorities from elected office. Congress's amendment of Section 2 of the Voting Rights Act in 1982 was premised on the fact that a "race neutral" election practice – one not enacted for a discriminatory purpose – could nevertheless deny minority citizens the opportunity for equal political participation because of the impact of racially polarized voting patterns. This Court has never held that a jurisdiction must blind itself to the racial consequences of its redistricting, or that race conscious remedial plans can never survive strict scrutiny.

The adoption of a rule that only majority white districts are presumed to be constitutional under the Fourteenth Amendment would be devastating for minority office holding since minorities have been elected in North Carolina and in the South – at the local, state, and national levels – primarily in majority-minority districts.

Of the 17 African-Americans elected to Congress in 1992 and 1994 from the 11 states of the old Confederacy,

all were elected from majority-minority districts. A pattern of minority office holding similar to that in Congress exists for southern state legislatures, counties, and municipalities. This pattern of minority office holding confined almost exclusively to majority-minority districts in the South is the direct result of racially polarized voting patterns that have prevailed long after the abolition of the white primary and the poll tax. Appellants' demand for allegedly "race neutral" majority white election districts simply ignores the fact that racial bloc voting is itself a form of racial discrimination which the states must have the power to ameliorate by drawing district lines that afford a measure of equal electoral opportunity to minority voters.

During the 1982 congressional hearings on the extension and amendment of the Voting Rights Act, opponents argued that the amendment of Section 2 would limit the political opportunities of minorities and would prevent minority members from exercising influence on the political system. Congress weighed these arguments, but determined that minorities should be guaranteed the equal right to elect representatives of their choice, and that districting systems were an appropriate way of securing that right. This Court should reject appellants' efforts to enact as constitutional doctrine the contrary political views that were unable to command majority support in Congress.

Congress also concluded that there was no factual basis for contending that majority-minority districts increased racial tensions or caused other harm. The decisions of district courts in the post-*Shaw v. Reno* redistricting cases do not contradict but support the findings of

Congress. The majority-minority congressional districts in the South are in fact the most *racially integrated* districts in the country. Far from causing harm, the evidence suggests that integrated majority-minority districts have promoted the formation of biracial coalitions and actually dampened racial bloc voting.

Voting districts have traditionally been drawn to accommodate the interests of various racial or ethnic groups. To apply a different standard in redistricting to African-Americans based upon speculative assumptions about segregation and harm would deny them the recognition given to others. To require the use of majority white districts only, and to do so in the name of color-blindness or the Fourteenth Amendment, whose very purpose was to guarantee equal treatment for blacks, would be a stunning irony.

The combination of *Shaw* and *Miller* has already precipitated a broad attack on majority-minority districts in various southern states. This Court could not have contemplated, and should not countenance, such a result.

ARGUMENT

I. Adoption of Appellants' "Race Neutral" Standard Would Repeal the Voting Rights Act and Purge Minorities from Office

Appellants make the extreme argument that where race has been a factor in redistricting in creating majority-minority districts "no claimed state interest should be

considered 'compelling' enough to pass the 'strict scrutiny' test." Brief of Appellants Shaw, *et al.*, on the Merits, p. 22. According to appellants, a jurisdiction might have a "strong interest" but it would never have a " 'compelling interest' in compliance with federal voting rights legislation." *Id.* at 32. Instead, the state's only " 'interest' would be to enact a race-neutral plan," *id.* at 33, *i.e.*, one in which all the districts were presumably majority white.

The adoption of such a "race neutral" standard – in reality a standard requiring or favoring majority white districts – would amount to repeal of the Voting Rights Act and would inevitably result in the broad purge of minorities from elected office. Congress's amendment of Section 2 of the Voting Rights Act in 1982 was premised on the fact that a "race neutral" election practice – one not enacted for a discriminatory purpose – could nevertheless deny minority citizens the opportunity for equal political participation because of the impact of racially polarized voting patterns. *See Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (Congress rejected a racial purpose standard in favor of one embodying "a 'functional' view of the political process"). For this reason, among others, this Court has never held that a jurisdiction must blind itself to the racial consequences of its redistricting, or that race conscious remedial plans can never survive strict scrutiny. To the contrary, in *Miller v. Johnson*, 115 S.Ct. 2475, 2490 (1995), the Court held that "[t]here is a 'significant state interest in eradicating the effects of past discrimination' ") (*quoting Shaw v. Reno*, 113 S.Ct. 2816, 2831 (1993)). *Also see*, 115 S.Ct. at 2500 ("we agree that . . . to meet statutory requirements, state legislatures must sometimes consider race as a factor highly relevant to the drawing of district lines . . . [and that] state legislatures may recognize

communities that have a particular racial or ethnic makeup, even in the absence of any compulsion to do so, in order to account for interests common to or shared by the persons grouped together") (Ginsburg, J., dissenting).[2]

In addition, on the same day it decided *Miller* the Court summarily affirmed a district court decision rejecting claims identical to those raised by appellants in this case that California's redistricting plans were racial gerrymanders. *See DeWitt v. Wilson*, 115 S.Ct. 2637 (1995). The California plans were drawn by a panel of three Special Masters and were approved by the State Supreme Court after the legislature deadlocked over redistricting. The Special Masters undeniably took race into account as a predominant factor in drawing their plans and frequently subordinated the state's traditional redistricting principles to race.

The Special Masters drew districts to maximize the number of majority-minority districts. According to the Supreme Court of California, the masters engaged in "successful efforts to maximize the actual and potential voting strength of all geographically compact minority groups of significant voting population." *Wilson v. Eu*, 4 Cal.Rptr. 2d 379, 393 (1992). The masters gave "federal

[2] Justice O'Connor made clear in her decisive concurring opinion in *Miller* that most redistricting plans would not be suspect "even though race may well have been considered in the redistricting process." 115 S.Ct. at 2497. *See Metro v. Bolden*, 446 U.S. 55, 87 (1980) (legislators "necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way") (Stevens, J., concurring in the judgment).

Voting Rights Act requirements . . . the highest possible consideration." *Id.* at 397. Because they were unaware of patterns of racial bloc voting, they chose to "draw boundaries that will withstand section 2 challenges under any foreseeable combination of factual circumstances and legal rulings." *Id.* at 399.

Despite the deliberate creation of majority-minority districts, the three-judge court found that strict scrutiny was not required because the masters "sought to balance the many traditional redistricting principles, including the requirements of the Voting Rights Act." *DeWitt v. Wilson*, 856 F.Supp. 1409, 1413 (E.D.Cal. 1994). The district court further held that even if it were applicable, the plans would survive strict scrutiny analysis. 856 F.Supp. at 1415. As the affirmance of *DeWitt* shows, 115 S.Ct. 2637, there is no basis in the decisions of this Court, nor in the experience of real world redistricting,[3] for appellants' extreme "race neutral" standard.

The adoption of a rule that only majority white districts are presumed to be constitutional under the Fourteenth Amendment would be devastating for minority office holding since minorities have been elected in North Carolina and in the South – at the local, state, and national levels – primarily in majority-minority districts.

[3] Robert G. Dixon, Jr., a leading scholar of reapportionment, has written that: "The key concept to grasp is that there are no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place." "Fair Criteria and Procedure for Establishing Legislative Districts" 7-8, in *Representation and Redistricting Issues* (Grofman, Lijphart, McKay & Scarrow eds., 1982).

The most comprehensive and systematic study to date of the Voting Rights Act is *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* (Chandler Davidson & Bernard Grofman eds., 1994), a collaborative effort by 27 political scientists, historians, and lawyers funded by the National Science Foundation.[4] It examined the impact of the Act in eight southern states covered in whole or in part by the special preclearance provisions of Section 5.[5] The three principal conclusions of the study are:

> First, the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts. Second, even today black populations well above 50 percent appear necessary if blacks are to have a realistic opportunity to elect representatives of their choice in the South. Third, the increase in the number of black districts in the South is primarily the result not of redistricting changes based on population shifts as reflected in the decennial census but, rather,

[4] *See* Richard H. Pildes, "The Politics of Race," 108 *Harv. L. Rev.* 1359, 1362 (1995) ("Utterly free of ideological cant, *Quiet Revolution* presents the most sober, comprehensive, and significant empirical study of the precise effects of the VRA ever undertaken. . . . With its rigorous methodology and systematic approach, *Quiet Revolution* immediately renders obsolete prior academic, judicial, and media accounts of the Act that rest on more anecdotal or speculative assertions.").

[5] The states are Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia. Five counties in Florida are also covered by Section 5, but that state was not included in the study. No portions of Arkansas or Tennessee, the other two Confederate States, are covered by Section 5. 28 C.F.R. pat. 51, App. (1994).

> of those required by the Voting Rights Act of 1965 and its 1982 amendments. . . . Federal intervention of this nature, as well as voting rights suits brought by private litigants, was primarily responsible for the significant increase in southern black officeholding.

Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in *Quiet Revolution, supra,* at 335-36.

Prior studies are generally consistent with these findings. *See* Chandler Davidson & George Korbel, "At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence," 43 *J. Pol.* 982 (1981); M. Margaret Conway, *Political Participation in the United States* 185 (1991); Charles S. Bullock, III, "Section 2 of the Voting Rights Act, Districting Formats, and the Election of African Americans," 56 *J. Pol.* 1098, 1103-04 (1994).

As an illustration of the findings of *Quiet Revolution*, of the 17 African-Americans elected to Congress in 1992 and 1994 from the 11 states of the old Confederacy, *all* were elected from majority-minority districts. 1990 U.S. Census, Population and Housing Profile; Congressional Districts of the 103rd Congress, C.Q. Weekly Report, V. 51, 3473-3487; David A. Bositis, *Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South* 14, 86 (Joint Center for Political and Economic Studies, 1995). For minorities to win in these states, it has generally been necessary for

them to run in districts with a majority-minority population.

The only black in the twentieth century to win a seat in Congress from a majority white district in one of the southern states targeted by the Voting Rights Act was Andrew Young. He was elected in 1972 from the Fifth Congressional District located in the Atlanta metropolitan area and in which blacks were over 40% of the population. Laughlin McDonald, Michael Binford & Ken Johnson, "Georgia," in *Quiet Revolution, supra,* at 85. Still, voting was strongly racially polarized and he got only 25% of the white vote. In 1990 Young ran for Governor of Georgia. In both the primary and runoff he again got about one-fourth of the white vote, but running statewide where blacks are 27% of the population he was defeated. *Id.*

Barbara Jordan, another African-American, was elected to Congress in 1972 from the Eighteenth District in Texas, but the district was minority Anglo. It contained a black population of 42% and a Mexican American population of 20%. Michael Barone and Grant Ujifusa, *The Almanac of American Politics 1974,* 1003 (1973).

Abolition of majority-minority districts would likely result in the elimination of most, if not all, of the African-American members of Congress from the South. The results in the rest of the country could be almost as dramatic. Of the 22 black members elected outside the South, only three were elected from majority white congressional districts. Elaine R. Jones, "In Peril: Black Lawmakers," *The New York Times,* Sept. 11, 1994, E19.

A pattern of minority office holding similar to that in Congress exists for southern state legislatures. Throughout the 1970s and 1980s, only about 1% of majority white districts elected a black. Blacks who were elected were overwhelmingly elected from majority black districts. Handley & Grofman, in *Quiet Revolution, supra,* at 336-37. As of 1988, no blacks were elected from majority white districts in Alabama, Arkansas, Louisiana, Mississippi, and South Carolina. *Id.* at 346.

The same pattern of an increase in the number of majority-minority districts and elected minority officials is repeated for southern cities and counties. As noted in *Quiet Revolution*:

> [We] reaffirm the standard view that at-large elections have deleterious effects on black representation for cities with white majorities and a black population of at least 10 percent. . . . [D]ramatic gains in black representation followed abolition of at-large elections – gains much greater than in cities that remained at large. (The negative impact of at-large elections is felt in county government too . . .).

Bernard Grofman and Chandler Davidson, "The Effect of Municipal Election Structure on Black Representation in Eight Southern States," in *Quiet Revolution, supra,* at 319.

This pattern of minority office holding confined almost exclusively to majority-minority districts in the South is the direct result of racially polarized voting patterns that have prevailed long after the abolition of the white primary and the poll tax. Appellants' demand for allegedly "race neutral" majority white election districts simply ignores the fact that racial bloc voting is itself a

form of racial discrimination which the states must have the power to ameliorate by drawing district lines that afford a measure of equal electoral opportunity to minority voters.

Deconstructing majority-minority districts would likely return North Carolina and the South to the days when legislative bodies were largely, or exclusively, white. John Lewis, who represents the Fifth Congressional District in Atlanta, called the attack on majority-minority districts unleashed by *Shaw v. Reno*, *supra*, "the greatest threat to the Voting Rights Act since it was written in August 6, 1965. If it wasn't for the Voting Rights Act, it would still be primarily white men in blue suits in Congress." Laughlin McDonald, "Voting Rights and the Court: Drawing the Lines," 15 *S. Changes*, Fall 1993, at 1, 5.

II. Congress Has Sanctioned the Creation of Majority-Minority Districts

Appellants' attack on the legislature's ability to draw majority black districts as a remedial measure is a poorly disguised effort to persuade this Court to adopt the political judgment of the congressional opponents of amended Section 2 of the Voting Rights Act. During the 1982 congressional hearings on the extension and amendment of the Voting Rights Act, opponents argued that the amendment of Section 2 would limit the political opportunities of minorities by allowing them "to become isolated" in single member districts, and would "prevent minority members from exercising influence on the political system beyond the bounds of their quota." *Voting Rights Act:*

Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 511 (statement of Dr. Edward J. Erler) and 1115 (statement of Robert M. Brinson) (1982). Dissenting members of the Senate subcommittee similarly argued that adoption of a results standard for Section 2 would lead to the creation of majority-minority districts, or "political ghettos for minorities," and that while "[m]inority *representation* in the most primitive sense may be enhanced by the proposed amendment . . . minority *influence* would suffer enormously." S.Rep. No. 417, 97th Cong., 2d Sess. 103 (1982) (additional views of Sen. Orrin G. Hatch of Utah).

Congress weighed these arguments, but determined that minorities should be guaranteed the equal right to elect representatives of their choice, and that districting systems were an appropriate way of securing that right. According to the Senate report, the testimony and other evidence presented to the subcommittee belied the predictions and speculations that the amendment of Section 2 would limit the political opportunities of minorities. *Id.* at 31-32. The subcommittee found there was "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify." *Id.* at 32.

The principal decision on which the committee relied was *White v. Regester*, 412 U.S. 755 (1973), invalidating multimember legislative districts on the ground that they diluted minority voting strength and requiring the adoption of single member districts to bring the minority community "into [the] full stream of political life of the county and State." *Id.* at 769, 773. In 1982 Congress adopted the legal standard for proving vote dilution

established in *White v. Regester* as the "results test" of amended Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

The Senate report, moreover, provides that in implementing remedies for Section 2 violations, a

> court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

S.Rep. No. 417, *supra*, at 31. One of the cases cited in the report as representing the "complete and full" remedy standard was *Kirksey v. Board of Supervisors*, 554 F.2d 139, 150-51 (5th Cir. 1977), in which the court rejected a proposed redistricting plan for a county board of supervisors because the two minority districts contained only "skin-of-the-teeth" black majorities, and therefore failed to provide blacks a "realistic opportunity" to elect representatives of their choice. The court also rejected the claim that an ameliorative plan "would be a racial gerrymander." *Id.* at 151.

In light of the legislative history and the language of the statute, the Court has consistently held that Section 2 guarantees the right "of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 113 S.Ct. 1149, 1155 (1993). And where violations are established, Congress itself has determined that complete and full remedies, including majority-minority single member districts, may properly be implemented. *See Johnson v. De Grandy*, 114 S.Ct. 2647,

2661 (1994) ("society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity"). This Court should reject appellants' efforts to enact as constitutional doctrine the contrary political views that were unable to command majority support in Congress.[6]

III. Racially Integrated Districts Do Not Segregate or Cause Harm

Appellants argue that majority-minority districts are a form of segregation, Brief of Appellants Shaw, *et al.*, on the Merits, p. 33, but legally and factually the claim has no merit. In the context of political participation, segregation involved, among other things, denying blacks the rights to register and vote, *South Carolina v. Katzenbach*, 383 U.S. 301, 310-13 (1966), participate in primary elections, *Smith v. Allwright*, 321 U.S. 649 (1944), and live in neighborhoods of their choice. *Buchanan v. Warley*, 245 U.S. 60 (1917). By contrast, the creation of a majority-minority district does not compel anyone to live there, or to continue living there. It doesn't deny anyone the right to run for office, or to vote for a candidate of his or her choice. No person has their vote diluted simply by reason

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[6] As the district court in *Gingles* observed, Congress has rejected "the fundamental risk that the recognition of 'group voting rights' and the imposing of an affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition." *Gingles v. Edmisten*, 590 F.Supp. 345, 356-57 (E.D.N.C. 1984), *aff'd in relevant part sub nom. Thornburg v. Gingles, supra.*

of living in a majority white or a majority-minority district. Legally, there is no valid analogy between Jim Crow and North Carolina's congressional redistricting plan.

Congress also concluded that there was no factual basis for contending that majority-minority districts increased racial tensions or caused other harm. Critics of the 1982 amendment argued that a results standard for Section 2 would "deepen the tensions, fragmentation and outright resentment among racial groups," *Voting Rights Act Hearings, supra,* at 662 (statement of John H. Bunzel), would "pit race against race," *id.* at 745 (statement of Michael Levin), "would exacerbate race consciousness," *id.* at 1250 (statement of Prof. Henry Abraham), "may well foster polarization," *id.* at 1328 (statement of Donald L. Horowitz), and would "compel the worst tendencies toward race-based allegiances and divisions." *Id.* at 1449 (letter from Prof. William Van Alstyne) (1982). Congress rejected these arguments on the ground that there was no evidence to support them, and concluded that the amendment would not "be a divisive factor in local communities by emphasizing the role of racial politics." S.Rep. No. 417, *supra,* at 33-2.

The decisions of district courts in the post-*Shaw v. Reno* redistricting cases do not contradict but support the findings of Congress. In *Johnson v. Miller,* 864 F.Supp. 1354, 1370 (S.D.Ga. 1994), the three-judge court, even though it invalidated the Eleventh Congressional District, concluded that "the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters." A parade of witnesses testified that the Eleventh District had not increased racial tension, caused segregation, imposed a

racial stigma, deprived anyone of representation, caused harm, or was a guaranteed black seat. *Johnson v. Miller,* Civ. No. 194-008 (S.D.Ga.), Trial Transcript, Vol. III, 268; IV, 104, 106, 239, 240, 242; VI, 36, 38, 45, 47, 56, 58, 117, 120. The district court acknowledged that under the Court's pre-*Shaw* decisions, "this lack of concrete, individual harm would deny them standing to sue." 864 F.Supp. at 1370. This Court did not disturb the district court's finding of no harm on appeal. *Miller v. Johnson, supra.*

In *Hays v. Louisiana,* 862 F.Supp. 119 (W.D.La. 1994), *vacated and remanded sub nom. United States v. Hays,* 115 S.Ct. 2431 (1995), the district court acknowledged "the great benefits that are derived by an increase in minority representation in government," that "minorities have shown that they perform admirably," that they "provide positive role models for all black citizens," and that they "insure that the legal obstacles to minority advancement in all areas of life will be eliminated." 862 F.Supp. at 128 (Shaw, J., concurring). Far from polarizing the community or increasing tensions, non-dilutive redistricting plans are a necessary remedy for continuing racial bloc voting and confer a benefit on persons of all races.

The majority-minority congressional districts in the South are in fact the most *racially integrated* districts in the country. They contain substantial numbers of white voters, an average of 45%. Bositis, *Redistricting and Representation, supra,* at 28. Moreover, blacks in the South continue to be represented more often by white than by black members of Congress, 58% versus 42%. *Id.* at 12. No one who has lived through it could ever confuse existing redistricting plans, with their highly integrated districts,

with racial segregation under which blacks were not allowed to vote or run for office. Segregation more accurately describes the systems that existed in states such as North Carolina, South Carolina, and Virginia, where all the congressional districts were majority white and no blacks in modern times had ever been elected to Congress prior to the creation of meaningfully integrated districts.

Whites are also frequently elected from majority-minority districts. During the 1970s whites won in 41% of the majority black house districts and in 75% of the majority black senate districts in seven southern states (Alabama, Georgia, Louisiana, Mississippi, North Carolina (senate only), South Carolina, and Virginia). Handley & Grofman, in *Quiet Revolution, supra*, at 336, 345. In the 1980s in the same states, whites won in 23% of the majority black house districts and in 38% of the majority black senate districts. *Id.* Given these levels of white success, racially integrated majority-minority districts cannot be dismissed simply as "quotas" or segregated seats for minorities.

Far from causing harm, the evidence suggests that integrated majority-minority districts have promoted the formation of biracial coalitions and actually dampened racial bloc voting. In Mississippi, after the creation of the majority black Second Congressional District, Mike Espy, an African-American, was elected in 1986 with about 11% of the white vote and 52% of the vote overall. In 1988 he won re-election with 40% of the white vote and 66% of the vote overall. "Republicans Push 'Hot Button' Issues," 16 *S. Exposure*, Winter 1988, at 5, 7.

In Georgia, the Second and Eleventh Congressional Districts became majority black for the first time in 1992. From 1984 to 1990, only 1% of white voters in the precincts within the Second, and 4% of white voters in the precincts within the Eleventh, voted for minority candidates in statewide elections. A dramatic and encouraging increase in white crossover voting occurred in 1992. Twenty-nine percent of white voters in the Second and 37% of white voters in the Eleventh voted for minority candidates in statewide elections that year. *Johnson v. Miller*, Civ. No. 194-008, *supra*, Department of Justice Exhibit 24, tables I, II, III (report of Allan J. Lichtman). These trends undermine the argument that majority-minority districts have exacerbated racial bloc voting.

According to one veteran observer of the voting rights scene, commenting specifically on the increased willingness of whites in Mississippi to vote for a black candidate in a racially integrated congressional district,

> this suggests that the creation of majority-minority districts and the subsequent election of minority candidates reduces white fear and harmful stereotyping of minority candidates, ameliorates the racial balkanization of American society and promotes a political system in which race does not matter as much as it did before.

Frank R. Parker, "The Constitutionality of Racial Redistricting: A Critique of *Shaw v. Reno*," 3 *D.C. L. Rev.* 1, 19-20 (1995).

Voting districts have traditionally been drawn to accommodate the interests of various racial or ethnic groups – Irish Catholics in San Francisco, Italian-Americans in South Philadelphia, Polish-Americans in Chicago,

see Miller v. Johnson, supra, 115 S.Ct. at 2505 (Ginsburg, J., dissenting), and Anglo-Saxons in North Georgia. Georgia's Ninth Congressional District, which is 95% white, was created in 1980 to preserve in one district the distinctive white community in the mountain counties of the state. *Busbee v. Smith*, 549 F.Supp. 494, 499, 517 (D.D.C. 1982) (the state "placed cohesive white communities throughout the state of Georgia into single Congressional districts . . . [f]or example, the so-called 'mountain counties' of North Georgia"), *aff'd*, 459 U.S. 1166 (1983). The district was again drawn as a majority white district during the 1990 redistricting process, and for the same reasons as in 1980. A member of the house reapportionment committee testified that the residents "are predominantly of an Anglo-Saxon bloodline," and the Ninth District was "drawn purposefully to maintain it as one district, a[n] area that has a distinct culture and heritage." *Johnson v. Miller*, Civ. No. 194-008, *supra*, Transcript of Preliminary Injunction Hearing, April 18, 1994, pp. 126-27.

No court has ever held or suggested that the majority white Ninth District was unconstitutional or constitutionally suspect. To apply a different standard in redistricting to African-Americans based upon speculative assumptions about segregation and harm would deny them the recognition given to others. To require the use of majority white districts only, and to do so in the name of color-blindness or the Fourteenth Amendment, whose very purpose was to guarantee equal treatment for blacks, would be a stunning irony.

IV. The Harm Caused By *Shaw* and *Miller*

The combination of *Shaw* and *Miller* has already precipitated a broad attack on majority-minority districts, a result that could not have been contemplated, and should not be countenanced, by this Court. In her concurring opinion in *Miller*, Justice O'Connor cautioned that the standard announced by the Court was "a demanding one" and "does not throw into doubt the vast majority of the Nation's 435 congressional districts." 115 S.Ct. at 2497. Despite these assurances, *Miller* has had the effect of calling into question the constitutionality not only of majority-minority congressional districts, but majority-minority legislative, county, and municipal districts as well. The unsettling effects of *Miller* have been substantial.

On remand in *Miller*, for example, the plaintiffs promptly moved to add parties to challenge the majority black Second Congressional District. The three-judge court, as promptly, granted the motion. *Johnson v. Miller*, Civ. No. 194-008, *supra*, Transcript of Hearing, August 22, 1995, p. 3. One member of the panel seemed prepared to rule without more that the district was unconstitutional. *Id.* at 66 ("I really don't see that it takes long to look at this horse [*i.e.*, the Second District]. . . . I don't think it will take a long evidentiary hearing to conclude what we have already concluded [about the Eleventh District]") (comments of Judge Edenfield). The Court specifically ruled that it would not allow any intervention by local residents to defend the Second District. *Id.* at 111-12.

Justice Ginsburg characterized the decision of the majority in *Miller* as an "invitation to litigation." 115 S.Ct.

at 2505. It is proving to be exactly that. Immediately after the *Miller* decision, the former speaker of the South Carolina house announced that "I think it would be fairly easy for any plaintiff in South Carolina to attack any of the three plans [congressional, house, senate] which have been adopted and prevail." Cindi Ross Scoppe, "Race-based districts illegal," *The Columbia State*, June 29, 1995, A1. The three plans, all of which contain majority black districts, were adopted as a result of litigation, *Burton v. Sheheen*, 793 F.Supp. 1329 (D.S.C. 1993), *vacated and remanded sub nom. SRAC v. Theodore*, 113 S.Ct. 2954 (1993), and Section 5 preclearance.

It didn't take long for someone to accept the former speaker's invitation to litigate. On September 28, 1995, five South Carolina residents, including a state senator, filed a lawsuit challenging the senate redistricting plan. *Smith v. Beasley*, Civ. No. 3-95-3235-0 (D.S.C.).

In Georgia, the governor called the legislature into special session on August 14, 1995 to redistrict the Congress. Mark Sherman, "Miller calls special session to redraw Georgia districts," *The Atlanta Journal*, July 7, 1995, 1A. However, after several weeks of fruitless wrangling and uncertainty over the standards applicable in redistricting, the legislature adjourned without adopting a plan. Holly Idelson, "It's Back to Drawing Board On Minority Districts," *Congressional Quarterly*, October 7, 1995, p. 3067. The chair of the senate reapportionment committee said that "[w]e have heard from five different attorneys and we have received five different interpretations." Mark Sherman, "Redrawn districts expected to face challenge," *The Atlanta Constitution*, August 2, 1995, B6. The chair said that "[n]obody knows what they're

doing." *Id.* The federal court will now draw the state's congressional redistricting plan.

While the Georgia legislature was unable to redistrict the Congress, it did pass new plans for the senate and the house. Although legislative redistricting was not an issue in *Miller*, and no court has suggested that the house and senate plans were unconstitutional, the governor included legislative redistricting in his call for a special session. Once the legislature was in session, one of the attorneys representing the plaintiffs in *Miller* advised house and senate redistricting committees that "[w]e are prepared to initiate litigation on . . . a number of legislative districts." Mark Sherman, "24 districts targeted for court fight," *The Atlanta Journal*, July 26, 1995. According to one media account, the *Miller* plaintiffs' lawyer identified "17 House and seven Senate districts across the state. Fourteen of those districts are represented by black lawmakers." *Id.* The same account predicted that "[r]edrawing 24 of the 54 mostly black legislative districts would almost certainly lead to a reduction in the number of black members of the Legislature." *Id.* By the time it adjourned, the general assembly passed new plans deconstructing 14 formerly majority black house districts and several formerly black senate districts. HB 7 EX, August 22, 1995; SB 3 EX, August 21, 1995. These plans on their face violate the non-retrogression standard of Section 5. *Beer v. United States*, 425 U.S. 130, 141 (1976).[7]

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[7] Even consent decrees in Section 2 cases are now regarded by some jurisdictions as vulnerable to *Shaw/Miller* challenges. In *Wilson v. Mayor and Board of Aldermen of St. Francisville, La.*, Civ. No. 92-765-B-1 (M.D.La. June 22, 1995), for example, the

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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defendants filed a motion for relief from the judgment on the grounds that "*Miller* calls into question the constitutionality of the apportionment plan adopted by the defendants pursuant to the Consent Judgment." Motion for Relief from Judgment Pursuant to FRCP Rule 60(b), p. 2.